IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JAWAD AL-GHEZZI and PATRICIA AL-GHEZZI, individually and as personal representatives of the estate of Laith Al-Gheezi,	)	No. 56702-1-I
	)	**DIVISION ONE**
Appellants,	)	UNPUBLISHED OPINION
v.	)	
BRIAN L. McCOY, individually and doing business as THE LAW OFFICES OF BRIAN L. McCOY and ASSOCIATES, INC., P.S., and JANE DOE McCOY, a marital community,	)	
Respondent.	)	FILED: September 18, 2006

APPELWICK, C.J. — Jawad and Patricia Al-Ghezzi sued Brian McCoy, their attorney in their medical malpractice claim. The Al-Ghezzis asserted that McCoy committed legal malpractice and breached his fiduciary duties by advising them not to accept a settlement offer during mediation, and by advising them to voluntarily dismiss their case while seeking to enforce an alleged settlement agreement. The trial court granted McCoy's summary judgment motion, finding that the Al-Ghezzis had not submitted any evidence of proximate

causation, and that there was no issue of material fact as to the existence of a real settlement offer. We affirm.

FACTS

After the death of their unborn son, Jawad and Patricia Al-Ghezzi sued Swedish Medical Center and the perinatologist on-call at the time of the death. The Al-Ghezzis claimed medical malpractice and wrongful death.

The Al-Ghezzis and their attorney, Brian McCoy, engaged in mediation with both defendants in June 2003. During the mediation, the Al-Ghezzis settled with the perinatologist for $50,000. Swedish then made what it characterized as an "exploratory" offer of settlement for $150,000. McCoy and the Al-Ghezzis agreed that they would try to get more than $150,000, and McCoy countered with $200,000.

Swedish declined to settle for $200,000. McCoy then faxed to Swedish written acceptance of the $150,000 exploratory offer. Swedish's counsel, Mary McIntyre, responded by informing McCoy that the offer was no longer on the table, as Swedish had decided its case was stronger than it had originally thought and was prepared to go to trial. She also told McCoy that once he had counter-offered $200,000, he had extinguished the original offer.

The next day, McCoy informed the Al-Ghezzis that he was going to try to enforce the $150,000 settlement offer for them. Two days later, he faxed the Al-Ghezzis a copy of the order he intended to file voluntarily dismissing their case

against Swedish with prejudice. McCoy noted that it meant the case was "over forever," but that he was "retaining the right to seek enforcement of the settlement which hopefully will be successful."

In response to the Al-Ghezzis' motion to enforce the settlement, Swedish submitted declarations from both McIntyre and Mark Conforti, the attorney for Swedish who had been present at the mediation. Both Conforti and McIntyre characterized the offer as exploratory, with McIntyre stating that even if the offer was not exploratory, McCoy extinguished it with his counteroffer. The trial court granted the Al-Ghezzis' motion to dismiss the case with prejudice, but denied their motion to enforce the settlement.

In April 2004, the Al-Ghezzis sued McCoy for legal malpractice and breach of fiduciary duty. McCoy moved for summary judgment, arguing that the Al-Ghezzis had not submitted expert testimony to support their claim, that they had not shown that McCoy's actions caused a loss of a settlement, that they had not shown that they would have prevailed in the underlying action, and that they showed no evidence of breach of fiduciary duty. In his reply in support of his summary judgment motion, McCoy attached an additional declaration from McIntyre, stating that there was no offer of $150,000 for the Al-Ghezzis to accept.

The Al-Ghezzis moved to strike this latest McIntyre declaration as improperly raising new issues in rebuttal. The trial court denied the motion to strike and granted McCoy's motion for summary judgment, ruling that the Al-

Ghezzis "failed to establish any evidence to submit to the trier of fact pertaining to proximate causation," and that "there was no genuine issue of material fact regarding existence of a settlement offer." After their motion for reconsideration was denied, the Al-Ghezzis appealed.

ANALYSIS

I. Propriety of the June 2005 McIntyre Declaration

The Al-Ghezzis claim that the trial court erroneously considered the June 2005 McIntyre declaration that McCoy submitted in his reply in support of his motion for summary judgment. The Al-Ghezzis assert that the declaration raised issues for the first time on reply and contradicted past sworn statements. Specifically, the Al-Ghezzis contend that the June 2005 McIntyre declaration contradicted earlier declarations that Swedish made an offer to settle for $150,000.

The moving party must raise in its summary judgment motion all of the issues on which it believes it is entitled to summary judgment. White v. Kent Med. Ctr. Inc., 61 Wn. App. 163, 168, 810 P.2d 4 (1991). "Allowing the moving party to raise new issues in its rebuttal materials is improper because the nonmoving party has no opportunity to respond." White, 61 Wn. App. at 168. "The de novo standard of review is used by an appellate court when reviewing all trial court rulings made in conjunction with a summary judgment motion." Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998).

The trial court properly considered the June 2005 McIntyre declaration because it did not raise any new issues. In the declaration, McIntyre explained the reasoning behind using exploratory offers, and stated that the $150,000 was just exploratory. She also stated that she directed Conforti to cease negotiations when she heard about the $150,000, and that she would not have approved a settlement for that amount. She concluded by stating that her position has always been that there was no $150,000 offer for the Al-Ghezzis to accept.

Thus, the declaration dealt with facts that were already at issue. The issue of the nature of the $150,000 offer was already before the court. McCoy had noted in his motion for summary judgment that Swedish had characterized the $150,000 as "an invitation to make an offer," and stated that the Al-Ghezzis appeared to take the same view in their complaint. The declarations attached to the motion for summary judgment also addressed the issue. In his July 2003 declaration in opposition to the Al-Ghezzis' motion to enforce the settlement agreement, Conforti characterized the offer as "exploratory." In her July 2003 declaration, McIntyre stated that the $150,000 was "only an invitation to make an offer or an exploratory offer to negotiate a contract in the future," in addition to characterizing the offer as "exploratory" in her June 2003 declaration. In his April 2005 declaration, McCoy stated that he received what was characterized as an exploratory offer of $150,000, and that the offer was never reduced to written form.[1] In response, the Al-Ghezzis submitted McCoy's June 2003

[1] The Al-Ghezzis object to the April 2005 McCoy declaration, claiming it is hearsay and conjecture. However, this argument appears only to pertain to the portions of the declaration

declaration in support of the Al-Ghezzis' motion to support the settlement agreement, in which McCoy stated that Swedish made an "unqualified offer of settlement for $150,000." Thus, the nature of the offer was very much at issue and was not a new issue raised in rebuttal.

The June 2005 McIntyre declaration also specifically rebutted a statement made by the Al-Ghezzis in their opposition to McCoy's motion for summary judgment. In a footnote near the end of their opposition motion, the Al-Ghezzis noted that the $150,000 offer "was either 'unqualified' (per McCoy) or 'exploratory' (per McIntyre). In any event, it is clear that the offer was put on the table and that Swedish would have followed through had McCoy recommended that the Al-Ghezzis accept the offer." However, McIntyre stated in her June 2005 declaration that she would not have approved a settlement for $150,000. CR 56(c) allows the moving party to submit rebuttal documents after the nonmoving party has filed its materials. "Rebuttal documents are limited to documents which explain, disprove, or contradict the adverse party's evidence." White, 61 Wn. App. at 168-69. Thus, the declaration rebutted the Al-Ghezzis' materials and was properly considered.

II. Proximate Causation

The Al-Ghezzis claim that the trial court erred in finding that no genuine issues of material fact existed in the instant case. They assert that whether they would have prevailed in the underlying matter is a question for the jury. McCoy

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that characterize the Al-Ghezzis' underlying medical malpractice and wrongful death suit as "weak" and "a probable loser." We address this argument below.

counters that because there was no genuine issue of material fact as to proximate causation, the trial court's ruling was correct.

A trial court properly grants summary judgment only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). The moving party can meet its burden by showing that there is an absence of evidence to support the nonmoving party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); Young v. Key Pharmaceuticals, Inc., 112 Wn.2d 216, 225-26, 770 P.2d 182 (1989). In this circumstance, the moving party is not required to support its motion by materials negating the nonmoving party's claim, but, rather, identify the portion of the materials which it believes demonstrate the absence of a genuine issue of material fact. Celotex, 477 U.S. at 322-23.

A plaintiff claiming legal malpractice must prove the following elements by a preponderance of the evidence:

> (1) The existence of an attorney-client relationship which gives rise to a duty of care on the part of the attorney to the client; (2) an act or omission by the attorney in breach of the duty of care; (3) damage to the client; and (4) proximate causation between the attorney's breach of the duty and the damage incurred.

Hizey v. Carpenter, 119 Wn.2d 251, 260-61, 830 P.2d 646 (1992). With respect to proximate causation, the plaintiff must show that but for the alleged malpractice, the plaintiff probably would have obtained a better result. See Daugert v. Pappas, 104 Wn.2d 254, 263, 704 P.2d 600 (1985). Although

proximate causation in legal malpractice cases is generally a question for the trier of fact, see Lavigne v. Chase, Haskell, Hayes & Kalamon, P.S., 112 Wn. App. 677, 683, 50 P.3d 306 (2002), courts do dismiss on summary judgment cases in which the plaintiff does not produce sufficient proof of proximate causation. See, e.g., Griswold v. Kilpatrick, 107 Wn. App. 757-58, 27 P.3d 246 (2001) (plaintiff produced insufficient proof that, but for the delay in prosecuting the case, the claim would have settled for a larger sum).

Summary judgment was proper because the Al-Ghezzis did not make a prima facie case that, but for McCoy's alleged negligence, they would have either prevailed in the underlying action or received $150,000 in settlement from Swedish. McCoy adequately pointed to the parts of the record that demonstrated the absence of an issue of genuine material fact as to proximate cause.

First, McCoy correctly noted that the Al-Ghezzis did not produce evidence that if McCoy had not moved to have the case dismissed with prejudice, the Al-Ghezzis would have prevailed in the underlying action at trial. In his motion for summary judgment, McCoy noted that in order to prevail on their claim that he acted negligently in recommending and moving for dismissal, the Al-Ghezzis would have to show that they would have prevailed in trial or on appeal, necessitating a "suit within a suit." McCoy noted that the Al-Ghezzis did not even allege that they would have achieved a better result had they gone through with trial. In response, the Al-Ghezzis, did not submit any evidence regarding

their likelihood of success in the underlying trial,[2] but rather stated simply that "it is an issue of fact whether the Al-Ghezzis would have prevailed against Swedish in the

[2] The Al-Ghezzis did submit a declaration from an attorney expert who opined that the advice McCoy gave and the position McCoy took during mediation fell below the standard of care. The expert also opined that McCoy's actions of simultaneously filing a motion to enforce the settlement agreement and a motion for voluntary dismissal were negligent, and that McCoy should have at least obtained informed consent.

lawsuit, and what that amount may have been."

However, it is not enough for the Al-Ghezzis to merely assert that there is a genuine issue of material fact; they must make a prima facie showing that this is so. And, as McCoy pointed out, they must do this by showing a likelihood that they would have prevailed in the underlying case. See, e.g., Ahmann-Yamane, LLC v. Tabler, 105 Wn. App. 103, 110, 19 P.3d 436 (2001) ("[t]o prove legal malpractice in an action involving an attorney's failure to file an appeal in a timely manner, the client must show that the appellate tribunal would have rendered a judgment more favorable to the client"), overruled on other grounds by Henderson v. Kittitas County, 124 Wn. App. 747, 752, 100 P.3d 842, review denied 154 Wn.2d 1028 (2004); Sherry v. Diercks, 29 Wn. App. 433, 437, 628 P.2d 1336 (1981) (to show proximate cause based on a claim of the attorney's failure to defend, the client must establish in a "suit within a suit" that if the action had been defended, the client would have achieved a better result). As McCoy pointed out, the Al-Ghezzis submitted no such evidence. Thus, the trial court properly granted summary judgment with respect to these claims.[3]

Second, McCoy correctly noted that the Al-Ghezzis did not produce evidence that if McCoy had proceeded differently during mediation, Swedish would have settled with the Al-Ghezzis for $150,000, or, indeed, any amount.

[3] The Al-Ghezzis allege that the trial court improperly relied upon McCoy's hearsay and speculative statements regarding the weakness of the underlying case in granting summary judgment. However, as noted, McCoy was not required to affirmatively show that the Al-Ghezzis were likely to lose in the underlying trial, but only demonstrate the absence of any evidence that the Al-Ghezzis would likely have prevailed. Thus, McCoy's statements on the weakness of the underlying case are extraneous and we need not address the Al-Ghezzis' objections to them.

McCoy asserted in his motion for summary judgment that, given the attached declarations and briefing from Swedish's counsel, it was clear that Swedish did not intend to make a firm offer of $150,000 or enter into a settlement, and that any assertion that Swedish would have settled if McCoy had acted differently is speculative. The Al-Ghezzis responded with an unsupported assertion that it was clear that Swedish would have followed through had McCoy recommended that the Al-Ghezzis take the offer.

Looking at all of the evidence in the light most favorable to the Al-Ghezzis, there is no genuine issue of material fact as to whether Swedish had made an offer to settle. The evidence shows that the $150,000 was an exploratory offer only, and was not an offer that the Al-Ghezzis could have accepted or enforced. This is supported by Conforti's July 2003 declaration, McIntyre's June 2003 declaration, McCoy's April 2005 declaration, and McIntyre's June 2005 declaration. In particular, McIntyre's June 2005 declaration is instructive:

> 4. In order to settle any claims against Swedish, it would have been necessary to obtain approval from Swedish's insurance carrier for the specific amount contemplated, as well as specific consent by a designated representative of Swedish. Sometimes, in cases where the demand at mediation exceeds the authority granted by the carrier, I will explore <u>possible</u> or "exploratory" discussions with opposing counsel. An example might be, if we were to offer you "x," would you take it with the understanding that I do not have that authority but could call to ask for more authority. The point of this type of exploratory negotiation is to see if there is any point in engaging in further discussion and to determine whether a plaintiff would have any interest in a particular settlement range below their stated demand. If there is no interest in a particular settlement range, then I avoid a useless call to the

> carrier to ask for additional authority beyond that granted prior to the mediation. . . .
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> . . . .
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> 7. During the mediation, there was some discussion of a possible or "exploratory" settlement between the Al-Ghezzis and Swedish for the amount of $150,000.00. This discussion was of the nature described in paragraph 4 above, and was not an offer to settle for that amount at that time. . . .
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> 8. While the mediation was ongoing and while I was at court on my other case, I was informed that there had been discussion of a possible or "exploratory" $150,000.00 settlement. I immediately called Mr. Conforti at the mediation and directed him to cease those discussions. I advised him and in turn advised my claims representative, that Swedish would not be making such an offer in light of my assessment of the case. Under no circumstances would I have approved a settlement for that amount.
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> 9. It was my position then, as it is today, that Swedish did not extend an offer to settle the matter with the Al-Ghezzis for $150,000.00, and that there was no such offer for Mr. McCoy to accept or reject on behalf of the Al-Ghezzis.

Thus, the Al-Ghezzis did not show that any actions on McCoy's part caused their "loss" of the $150,000 settlement offer, because no such offer existed.

The Al-Ghezzis claim that the June 2003 McCoy declaration creates a genuine issue of material fact as to whether there was an offer of $150,000. In his June 2003 declaration in support of his motion to enforce the settlement agreement, McCoy characterized the offer as an "unqualified offer of settlement for $150,000." Since this characterization conflicts with the characterization of the offer by Swedish as "exploratory," the Al-Ghezzis assert there is a genuine issue of material fact.

But the June 2003 McCoy declaration does not rebut the statements in the Conforti declaration and thus does not create an issue of material fact.

Because the negotiations were conducted orally through a mediator, McCoy did not hear Conforti's words. McCoy had no personal knowledge and therefore cannot testify to what Conforti said in making the offer. McCoy can only speak to what he understood the mediator to convey. The mediator was the only person who could speak both to what Conforti said and what the mediator conveyed to McCoy, and neither side submitted a declaration from the mediator. Thus, taken together with the other evidence in the case, McCoy's June 2003 declaration only shows that McCoy was mistaken as to the nature of the offer. The Al-Ghezzis have not shown the existence of a genuine issue of material fact.

Further, the Al-Ghezzis can only speculate as to whether Swedish would have settled with them for some amount, had McCoy indicated an interest in the $150,000 or conducted the mediation in a different way. The Al-Ghezzis have submitted no evidence from Swedish that Swedish would have settled for any amount less than $150,000. Swedish's testimony that it would not have settled was therefore unrebutted.

Griswold is instructive. In Griswold, the plaintiff sued her attorney, asserting her underlying medical malpractice claim would have settled for a larger amount if the attorney had prosecuted the case more quickly. Griswold, 107 Wn. App. at 759. The plaintiff's husband, the alleged victim of the medical malpractice, had had a heart attack shortly before settlement, which the plaintiff alleged reduced the settlement value of the case. Griswold, 107 Wn. App. at

759-60. The court found that the plaintiff's proof on the proximate cause element was insufficient to withstand summary judgment because she did not offer declarations from any of the defendant's personnel stating that the defendant would have been ready and willing to mediate at an earlier time than it did. Griswold, 107 Wn. App. at 760. The court also found that the plaintiff's attorney-expert's opinion as to the reduction in value of the case was unfounded, and that the expert had no information indicating that the defendant would have settled for a larger sum before the heart attack. Griswold, 107 Wn. App. at 761. Similarly, here, the Al-Ghezzis can only speculate as to whether they would have settled with Swedish and for what amount. The trial court thus properly granted summary judgment.

III. Breach of Fiduciary Duty

The Al-Ghezzis argue that the trial court erred in granting summary judgment because there were genuine issues of material fact as to McCoy's breach of his fiduciary duty to the Al-Ghezzis. The Al-Ghezzis cite several Rules of Professional Conduct (RPCs) that they allege McCoy violated, and note that one Washington case found that an attorney's violation of the RPCs constituted a violation of his fiduciary duties.

Violation of the RPCs may not be used as evidence of legal malpractice. Hizey, 119 Wn.2d at 265-66. But a trial court can consider the RPCs when determining whether an attorney breached his or her fiduciary duty to a client. See Cotton v. Kronenberg, 111 Wn. App. 258, 266, 44 P.3d 878 (2002). A

plaintiff claiming breach of fiduciary duty must prove "(1) existence of a duty owed, (2) breach of that duty, (3) resulting injury, and (4) that the claimed breach proximately caused the injury." Micro Enhancement Int'l, Inc. v. Coopers & Lybrand, LLP, 110 Wn. App. 412, 433-34, 40 P.3d 1206 (2002).

The Al-Ghezzis cite to RPC 1.1, which requires a lawyer to competently represent his or her client, and RPC 1.4, which requires a lawyer to keep his or her client reasonably informed about the status of a matter and explain a matter sufficiently well to allow the client to make informed decisions.[4] They argue that McCoy breached RPC 1.1 by first advising the Al-Ghezzis to reject the $150,000, and later advising them to dismiss the case because it was weak. They also argue that McCoy breached RPC 1.4 by failing to advise them that the court would almost certainly find that no enforceable settlement existed.

The Al-Ghezzis' breach of fiduciary duty claim fails for the same reason their legal malpractice claim fails: they have not made a prima facie showing of proximate causation of their alleged damages. They have presented no evidence that, absent McCoy's alleged incompetent representation, they would have received a true settlement offer or would have prevailed at trial. Likewise, they have presented no evidence that if they had been adequately informed of the risks of dismissing the lawsuit, they would have gone on with the lawsuit and

[4] In their complaint, in addition to RPCs 1.1 and 1.4, the Al-Ghezzis asserted that McCoy violated RPC 1.2, 1.3, 1.5, 1.7, and others. However, because they do not argue breach of these RPCs on appeal, the panel need not consider them. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (party waived assignment of error when it presented no argument pertaining to that claimed error).

prevailed at trial. Thus, the trial court did not err in finding that no genuine issue of material fact existed.

We affirm.

Appelwick, C.J.

WE CONCUR:

Dwyer, J.

Azid, J.